Supreme Court, U.S.
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NO. 09-799

In The
# Supreme Court of the United States

ERIC L. DAVIES AND MIRELLA M. DAVIES

*Petitioners*,

v.

Hon. PHILIP DOI;
Judge of the Hawaii District Court, First Circuit;

Judges of the Hawaii Circuit Court, First Circuit;

DAVID T. MOYSA and JANE F. MOYSA;

*Respondents*.

On Petition For Writ of Certiorari
To The Supreme Court of The State of Hawaii

## REPLY TO BRIEF IN OPPOSITION

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## SUMMARY OF ARGUMENT

1. The fact the Moysas filed a detailed brief in opposition belies their assertion that there is no longer an active controversy. The parties' legally cognizable interest in the outcome derives from both a civil judgment which hinged on matters of federal law and a pending criminal prosecution based on allegations of violation of an unconstitutional order.

2. Simultaneous with telling this court that there is no reasonable expectation that the injury will be repeated the Moysas have asked the Hawaii District court to repeat the injury, requesting another three year injunction with the same facially unconstitutional terms.

3. The decisions of the Hawaii appellate courts conflict with decisions of this court and of other state courts of last resort, and further implicate one or more federal questions that have not been decided by this court. Therefore, there are compelling reasons for the Petition to be granted:

a. The decision of the Hawaii ICA which affirmed an effective complete ban on any use of amplified sound by the Davies because it does "not regulate the content of the sound" conflicts with *Madsen v. Women's Health Ctr.*, 512 U.S. 753 (1994) and a host of other decisions of this court.

b. The two decisions of the Hawaii Supreme Court holding that an inadvertent procedural error bars all future review of a facially unconstitutional order because the order was issued by a civil court conflicts with the First Amendment itself and *Marbury v. Madison* , 5 U.S.

137 (1803). Further, it raises questions that have not been clearly decided by this court.

c. The two decisions of the Hawaii Supreme court holding that there is no right to effective counsel in this civil case that involves the deprivation of fundamental constitutional rights conflicts with the decisions of many other state appellate courts of last resort, including *In re Ak.V.*, 747 A.2d 570 (D.C.2000).

## REPLY TO STATEMENT OF THE CASE

The "facts" asserted by respondents that the Davies "continued to violate" the initial injunction are false[1]. [Opposition Brief pp 7-8] The appellate record contains only ex-parte claims to that effect made in writing by the Moysas. The trial court rejected these claims without holding a hearing or providing the Davies an opportunity to reply.

## ARGUMENT

### I. There Remains an Active Controversy and the Issues are not Moot.

The fact that the Moysas have gone to considerable effort and expense to oppose the Petition belies their claim that there is no out-

[1] The claim that the Davies harassed the Moysas is also untrue, despite the ruling of the trial court granting the injunction. The Davies believe that the Moyas claimed "harassment" because they disliked being able to overhear the Davies listening to religious teaching and found the harassment statute an effective means to silence the Davies' free speech. "Annoyance at ideas can be cloaked in annoyance at sound." *Saia v. New York*, 334 U.S. 558,562 (1948)

standing controversy because the injunction has expired. If the issues were truly resolved, the Moysas would not be working so hard to convince this court to not hear the case.

The Moysas first cite to *Allen v. Wright*, 468 U.S. 737 (1984), a case which *never* had an "actual controversy"[2], and does not directly apply. *United States Parole Comm'n v. Geraghty*, 445 U.S. 388 (1980)[3], cited by the Moysas, supports the Davies by holding:

> "The fact that a named plaintiff's substantive claims are mooted due to an occurrence other than a judgment on the merits does not mean that all other issues in the case are mooted." (internal citations omitted) *Id* at 388.

Similarly, the fact that the injunction in question has expired without a judgment on the merits does not mean all other issues in this case are mooted. In their brief, the Moysas neglected to address the fact that there are two fundamental substantive

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[2] In *Allen*, parents of black children who were attending public schools brought a nationwide class action alleging that the IRS has not adopted sufficient procedures to deny tax-exempt status to racially discriminatory private schools. The parents did not allege that their children had ever applied or would ever apply for admission to any private school, and this court held the parents lacked standing to bring suit.

[3] Geraghty brought suit challenging the validity of the United States Parole Commission's Parole Release Guidelines. The District Court denied respondent's request for certification of the suit as a class action and this court held that an action brought on behalf of a class does not become moot upon expiration of the named plaintiff's substantive claim, even though class certification has been denied.

unresolved issues in this case: a) financial damages and b) a still pending criminal prosecution.

As the state court was fond of noting, this is a civil case. As a result of the civil case, the Hawaii Supreme court has issued a judgment of $25,189.23 against the Davies. This judgment critically relies on the court's errant interpretation of constitutional and federal law. This petition challenges that judgment.

The petition for Mandamus presented to the Hawaii Supreme court, also raised by this Petition, included a request for an order to the Hawaii circuit court to dismiss all criminal charges against Mirella Davies which derive from the facially unconstitutional order banning barely audible sounds near the Davies' property line. The Circuit court has stayed the criminal trial pending the outcome of the appeal, and awaits this court's decision before proceeding[4].

Because of the fact that there are at least these two live, outstanding issues, the parties have "a legally cognizable interest in the outcome", this court can still provide very "meaningful relief" and the case is not moot. *County of Los Angeles v. Davis*, 440 U.S. 625 (1979)[5].

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[4] In practical effect the circuit court is providing Mirella Davies a second opportunity for interlocutory appeal since it was the court's procedural error that denied her an "official" interlocutory before the Hawaii ICA.

[5] In *Davis*, Mexican-American applicants to the Los Angeles County Fire Department brought a class action alleging discriminatory hiring practices. This court found the case moot because the department had changed its practices by order of the District Court and unlike this case there was no reasonable expectation it would resume the improper practice.

## II. The "Temporary" Injunction May Soon be Repeated and the Evading Review Doctrine Applies

The Moysas argue that the evading review exception does not apply because there is no reasonable expectation that the Davies would be subject to the same injury again. [Opposition Brief, pp 16-23]. This assertion is stunningly disingenuous in light of the fact that the Moysas *have already filed a petition* before the Hawaii District court requesting an issuance of *an identical injunction* for another three years. This petition was written on January 31, 2010 – only 27 days after the expiration of the previous injunction, and *during the preparation of the opposition brief.*

Further, at the preliminary hearing before the Hawaii District court on February 11, 2010 the court stated it was inclined to rely upon the vacated but not reversed ruling of the Hawaii ICA which wrongly held that the criminalization of a barely audible sound did not violate the Davies' free speech because it did not regulate the content of the sound. As of this writing the trial date soon approaches where the district court may again deprive the Davies of their most fundamental speech rights by again forcing them to live without the use of all modern electronics which make a sound.

Should this court deny this Petition, the Davies may well be faced with at minimum another full year before a new appeal is heard again before the Hawaii ICA, which has already ruled in clear disregard for federal law and is reasonably likely to do so again.

## III. The Decisions of the Hawaii ICA and the Hawaii Supreme Court are not Consistent with Decisions of this Court.

In their opposition, the Moysas do not even attempt to defend the Hawaii ICA's opinion affirming the injunction because "it does not regulate the content of the sound" [Opposition Brief pp 24-26]. Instead, the Moysas argue in a variety of ways that important government interests may justify "incidental" limitations on free speech. This is of course not inconsistent with *Madsen v. Women's Health Ctr.*, 512 U.S. 753 (1994) which holds that a content neutral injunction must "burden no more speech than necessary" to achieve a "pin pointed" objective.

However, in order to not further appear disingenuous the Moysas do not even attempt to expressly argue that a ban on the slightest momentary amplified sound, at any time, in any place, audible only a few steps away from the source, regardless of whether the sound has a legitimate purpose[6] actually qualifies as an "incidental" or "reasonable" limitation, nor that it burdens "no more than necessary". Clearly the injunction condition does not even make the slightest token effort to be reasonable time, place, or manner, and in practical reality constitutes an absolute ban (as reflected by the decision of two separate federal courts in *Deegan v. City of Ithaca*, 444 F.3d 135 (2d Cir. 2005) and *Lilly v. City of Salida* 192 F Supp. 2d 1191 (D. Col 2002) ). Instead,

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[6] Soon after the amended injunction issued, a large wildfire burned near the Davies' home and power was cut off. The injunction prohibited the Davies from listening to their battery powered radio for emergency information.

without any argument or grounding in fact or law, the Moysas simply wishfully fantasize that the Davies' rights are "substantially unimpeded" [Opposition Brief p 26].

There is no doubt that the sound restriction of condition 1 as amended is as facially in violation of the First Amendment as the speech content restriction was. However, that is not the question before this court. At issue is the decisions of the Hawaii Supreme court, twice holding that it is proper to bar all judicial review of a facially illegal injunction (thereby enforcing an inherently void order[7]), depriving the Davies of fundamental federal rights because the criminal injunction was issued by a civil court and, in the court's view, the Davies' attorney erred by appealing a "superfluous" order[8,9]. In their brief, the Moysas add nothing of substance on the matter, doing little more than restating the two opinions of the Hawaii supreme court denying appellate review and mandamus. [Opposition Brief pp 26-27]

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[7] "a law repugnant to the constitution is void" *Marbury v. Madison*, 5 U.S. 137 (1803)

[8] Believing that order granting the motion to amend the injunction was an appealable order, the Davies' attorney filed the notice of appeal 50 days after the injunction was issued, only 20 days past the limit allowed by Hawaii Rules of Appellate procedure Rule 4(a).

[9] An interesting contrast to this case can be found in *Crosby v. The Bradstreet Co.*, 312 F.2d 483 (2d Cir.1963) which found a stipulated injunction in volation of the First Amendent and void ab inito *thirty years* after the injunction was issued.

A ban on all judicial review of a facially illegal injunction because of an inadvertent procedural error on appeal is not proper. The reasoning is so blindingly simple that the Hawaii Supreme Court was unable to grasp it:

a) The United States Constitution is the supreme law of the land, and is therefore superior to the Hawaii Rules of Appellate Procedure[10].

b) The injunction violates the Davies' First Amendment Rights, or at the least after review would likely be found in violation.

c) The Fourteenth Amendment forbids the state of Hawaii from enforcement of laws which violate the First Amendment and further requires due process of law[11].

... and therefore...

d) The Davies are entitled to judicial review, either through direct appeal (regardless of a minor procedural error) or through a petition for mandamus.

The fact that neither the Davies, nor the Moysas, nor the Hawaii courts could find case law directly addressing these issues raised by this case is

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[10] Article 6, United States Constitution: "This Constitution.. shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding"

[11] Fourteenth Amendment, United States Constitution: "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States nor shall any State deprive any person of life, liberty, or property, without due process of law;"

a compelling reason for this court to accept this Petition.

Finally, the Moysas make no attempt to address the fact that in contrast with the Hawaii Supreme court, other state courts of last resort have found that a right to effective counsel can exist in civil cases involving the potential deprivation of fundamental rights, as justice cannot be served through a malpractice suit against the attorney. (e.g. *In re Ak.V.*, 747 A.2d 570 (D.C.2000), discussed in the Petition)

## CONCLUSION

We have been made to live in fear of arrest for speaking any reference regarding the Moysas, resulting in the destruction of many personal relationships; been forced by the state to live in the manner of as if in an age before modern electronics, in practically have been banned from listening to our religious teaching inside our own home; had our home forcibly violated without a warrant by the police because someone claimed they heard a sound and now face criminal charges despite having a recording of the "witnesses" plotting to falsify claims of having heard a sound; been driven into bankruptcy and spent our life savings attempting to have our rights restored to us; and are now ordered to pay over $25,000 to the Moysas despite the court having concluded that the speech restriction violated our rights. Now, we face having to go through it all again for another three years.

Throughout all of this, no court has yet, not once, asked the most basic question: "Is this restriction reasonable?" "Does it restrict more than necessary?" In fact, six different courts (including the federal courts) have desperately avoided addressing the issue. The legal system in Hawaii has shamed itself and has lost sight of the concept of justice.

The name of each justice of this court is recognized in our home as it is in millions of others throughout the country and the world. The Supreme Court of the United States of America represents to most the ultimate, in this world, of human ability to dispense justice. While each member of the court may come from different backgrounds and exhibit different political persuasions, we and millions of others have faith in one overriding principle: You all deeply love our constitution and have dedicated your lives to protecting our freedoms.

We plead with this court to accept our Petition, so that at least one court will have drawn a line in defense of the First Amendment.

DATED: Honolulu, Hawaii, March 22, 2009.

Respectfully Submitted,

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